

Letter of Findings: 04-20110613
Sales and Use Tax
For Tax Years 2008, 2009, and 2010

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ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-1-1](#); [45 IAC 2.2-3-14](#); [45 IAC 2.2-4-1](#); [45 IAC 2.2-4-2](#); [45 IAC 2.2-4-21](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974).

Taxpayer protests the assessments of use tax on the purchases of tangible personal property.

STATEMENT OF FACTS

Taxpayer is a partnership which owns and operates a restaurant/bar in Indiana. In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer. Pursuant to the audit, the Department determined that Taxpayer failed to pay sales tax or self-assess use tax on tangible personal property it purchased and used in the course of its business activities, including capital assets in Taxpayer's depreciation schedule. The audit concluded that Taxpayer did not maintain proper records showing that sales tax was paid on these purchases. As a result, the Department assessed additional use tax and interest.

Taxpayer only protested the Department's assessments on several capital assets, which were listed in the depreciation schedule. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit assessed use tax on Taxpayer's purchases of capital assets which were listed in Taxpayer's depreciation schedule. Taxpayer did not maintain adequate records to show that the sales/use taxes on these purchases were paid.

Taxpayer, to the contrary, first claimed that some of its payments were for "Labor," a service, and thus these payments were not subject to sales/use tax. Taxpayer also maintained that certain assessments on capital assets were related to the expenses of remodeling the restaurant/bar and that the contractors purchased the materials used to perform the jobs and paid sales tax on the materials at the time of the purchases. Taxpayer thus asserted that it either reimbursed the contractors for the costs of the materials or the sales/use taxes were included in the invoices. Additionally, Taxpayer asserted that it was not responsible for the use tax pursuant to [45 IAC 2.2-3-14](#) because it had paid the sales tax on certain purchases of tangible personal property.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

IC § 6-8.1-5-4(a) further provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).**

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called the "use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly

out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Id.*; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Id.* A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a). Nonetheless, if the property used in Indiana "was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property," the property is "exempt from the use tax." IC § 6-2.5-3-4(a)(1). There are other exemptions available for sales/use tax. IC § 6-2.5-5-1 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101.

IC § 6-2.5-1-1(a), in pertinent part, defines:

"Unitary transaction" includes **all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.** (Emphasis added).

[45 IAC 2.2-1-1](#)(a) explains:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. **A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.** (Emphasis added).

IC § 6-2.5-4-1, in relevant part, states:

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

(1) the property is transferred in the same form as when it was acquired;

(2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

[45 IAC 2.2-4-1](#) explains:

(a) **Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail** unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

(1) The price arrived at between purchaser and seller.

(2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

[45 IAC 2.2-4-2](#) states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;

(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

(3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and

(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) **Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.**

(d) **A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services.** If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction. **(Emphasis added).**

Also of relevance is [45 IAC 2.2-4-21](#), which states:

(a) **In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.**

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [\[45 IAC 2.2-5\]](#)). **(Emphasis added).**

In this instance, Taxpayer divided its protest of the assessments into eight (8) categories, (A) through (H), as follows:

TPB	Date	Ref.	Vendor	Item Description	Amount	Audit
(A)	07/01/2010	49DS	no details	US Bar Remodel	\$ 13,438.00	pg. 17
(B)	09/26/2010	50DS	no details	Kitchen Equipment	\$ 11,438.00	pg. 17
(C)	08/15/2009	48DS	no details	Improvements	\$ 31,176.00	pg. 13
(D)	09/19/2008	29DS	no details	TV-xxx xxxx	\$ 1,188.00	pg. 9
(E)	11/05/2008	30DS	no details	TV & Wall Mount xxx	\$ 2,732.00	pg. 9
(F)	08/21/2008	31DS	no details	Sound System	\$ 3,221.00	pg. 9
(G)	03/13/2008	40DS	no details	Server Station	\$ 10,421.00	pg. 6
(H)	02/28/2008	34DS	no details	Bar	\$ 10,155.00	pg. 6
(H)	03/07/2008	37DS	no details	Flooring	\$ 8,095.00	pg. 6
(H)	06/30/2008	36DS	no details	Alarm System	\$ 2,946.00	pg. 9
(H)	06/30/2008	38DS	no details	Equipment	\$ 6,750.00	pg. 9
(H)	09/30/2008	35DS	no details	Leasehold Improvement	\$ 139,000.00	pg. 9

Taxpayer stated that each of the categories contains more than one transaction and submitted an "Unofficial Workpaper" ("Workpaper") providing a break-down of those transactions for each category. Taxpayer also provided copies of invoices and statements from several vendors to support its protest. This Letter of Findings addresses each of the categories as follows:

A. US Bar Remodel.

The Department's audit assessed Taxpayer use tax on "US Bar Remodel" in the amount of "\$13,438" because Taxpayer failed to provide documentation to show that the sales/use taxes were paid.

Taxpayer claimed that the line item of "US Bar Remodel" in the amount of "\$13,438" consists of seventeen (17) transactions and most of the transactions were payments for "Labor." Thus, Taxpayer asserted that it was not responsible for the sales/use tax because "Labor" is not subject to sales/use tax. Taxpayer also maintained that it was not responsible for the use tax on transactions involving materials used by its contractors because the contractors paid the sales tax. To support its protest, Taxpayer referred to the Workpaper, listing the break-down of the seventeen (17) names of individuals/companies in this category. Taxpayer also pointed to the copies of invoices/statements to support its protest.

Upon reviewing Taxpayer's documentation, the Department is not able to agree. First, Taxpayer's Workpaper listed seventeen (17) transactions/payments in this category but it only provided fifteen (15) statements/invoices. Thus, the total amount claimed in this category could not be substantiated and verified. Also, upon further review of the invoices/statements, several statements/invoices showed that the charge for labor and the charge for materials were not separate. Those transactions thus are considered as unitary transactions and the total amount of each of those transactions are taxable under IC § 6-2.5-1-1(a) and [45 IAC 2.2-1-1\(a\)](#). Additionally, the Department's audit summary listed that Taxpayer purchased "US Bar Remodel" on July 1, 2010; however, none of the 15 statements/invoices were dated July 1, 2010. Rather, the 15 transactions/payments were dated variously after July, 2010 (from August 2, 2010 through December 30, 2010).

Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is incorrect.

In short, Taxpayer's protest is respectfully denied.

B. Kitchen Equipment.

The Department's audit assessed Taxpayer use tax on "Kitchen Equipment" in the amount of "\$11,438"

because Taxpayer failed to provide documentation to show that the sales/use taxes were paid. Taxpayer, to the contrary, stated that it paid sales tax to the supplier at the time of the purchases. Taxpayer provided three (3) copies of the invoices to support its protest.

Upon reviewing Taxpayer's documentation, the Department is prepared to agree that Taxpayer's documentation is sufficient to demonstrate that it purchased kitchen equipment from the same vendor to which it paid sales tax at the time of its purchases. Thus, Taxpayer is not responsible for the use tax pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-14](#).

In short, Taxpayer's protest of the assessment of "Kitchen Equipment" is sustained. The Department will remove this "Kitchen Equipment" assessment and recalculate Taxpayer's tax liability in a supplemental audit.

C. Improvements.

The Department's audit assessed Taxpayer use tax on "Improvements" in the amount of "\$31,176" because Taxpayer failed to provide documentation to show that the sales/use taxes were paid. Similar to the explanation provided in Category A, Taxpayer claimed that it was not responsible for some sales/use tax for the same reasons.

Upon reviewing Taxpayer's documentation, the Department is not able to agree. First, Taxpayer's Workpaper simply stated that there was "no detail general journal entry" to account for a transaction in the amount of "\$3,886.69." Similar to Category A, Category C of Taxpayer's Workpaper also consists of various transactions/payments with different vendors on various dates which cannot be substantiated or verified. Specifically, Taxpayer claimed a depreciation deduction concerning the capital asset purchase for "\$31,176" but it could not reconcile its records. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

D. TV.

The Department's audit assessed Taxpayer use tax on "TV-XXX," in the amount of "\$1,188" because Taxpayer did not have documentation to show that sales/use tax was paid at the time of the purchase.

Taxpayer's Workpaper stated that this "\$1,188" purchase consists of two (2) payments: (1) \$962.99 for a television, including sales tax, and (2) \$225 was a payment to an individual for installing the television. Taxpayer maintained that since Taxpayer paid the sales tax on the television purchase and the \$225 payment was paid for a non-taxable service, the Department's audit erroneously assessed sales/use tax on "TV- XXX."

Upon reviewing Taxpayer's documentation, however, the Department is not able to agree. The Department has no doubt that Taxpayer purchased a television for \$962.99 which included sales tax. That receipt, however, can only support the fact that Taxpayer purchased a television for \$962.99 and paid the sales tax on that purchase; that receipt alone is not sufficient to support the claimed "\$1,188" purchase. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

E. TV & Wall Mount.

The Department's audit assessed Taxpayer use tax on "TV & Wall Mount XXX" in the amount of "\$2,732" because Taxpayer did not have records showing that sales/use tax was paid at the time of the purchase.

Taxpayer's Workpaper stated that this "\$2,732" purchase consists of five (5) payments, one of the payments of which was a television purchase (including sales tax) and the remaining four (4) payments were payments to two individuals who performed the installation. Taxpayer thus maintained that the Department's audit erroneously assessed sales/use tax on "TV & Wall Mount XXX" because it paid the sales tax on the television purchase and the remaining payments were paid for non-taxable services.

Upon reviewing Taxpayer's documentation, however, the Department is not able to agree. Similar to the discussion in Category D, the Department has no doubt that Taxpayer paid sales tax on its purchase of a television. That receipt alone, however, can only support the fact that Taxpayer purchased that television for \$1,205.44, which included the sales tax. In the absence of other documentation, that receipt alone is not sufficient to support the claimed "\$2,732" purchase. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

F. Sound System.

The Department's audit assessed Taxpayer use tax on "Sound System" in the amount of "\$3,221" because Taxpayer did not provide any documentation showing that sales/use tax was paid at the time of the purchase.

Taxpayer claimed that this "\$3,221" sound system consists of four (4) payments to contractors (individuals/companies) who installed the sound system for Taxpayer. Taxpayer did not dispute three out of the four payments were subject to sales/use tax. Rather, Taxpayer asserted that the forth payment in the amount of "\$1,723.29" was made to a contractor who paid sales tax on the materials. Taxpayer thus maintained that it was not responsible for the use tax because the contractors paid the sales tax on the materials and "Labor" was not

subject to sales/use tax.

Upon reviewing Taxpayer's documentation, the Department is not able to agree. First, similar to its explanation in Category A and C, Taxpayer's Workpaper listed four payments in this category but it only provided one invoice in the amount of "\$1,723.29." Thus, the total amount designated in this category cannot be substantiated and verified. Additionally, the Department's audit summary listed that Taxpayer purchased this line item on August 21, 2008; Taxpayer's documentation showed that the payment was made on October 13, 2008. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

G. Server Station.

The Department's audit assessed Taxpayer use tax on "Server Station" in the amount of "\$10,421" because Taxpayer did not pay sales/use tax.

Taxpayer claimed that this "\$10,421" purchase consists of five (5) payments. Taxpayer stated that, among the five payments, the first two payments were made to a vendor who worked on the server station and the vendor paid sales tax for the materials used at the time of the purchases. Taxpayer stated that the third and fourth payments were two installment payments for purchases of tangible personal property which sales tax was paid at the time of the purchases. Taxpayer further stated that the fifth payment was paid to an individual contractor and it did not dispute the assessment on that transaction.

Upon reviewing Taxpayer's documentation, the Department is not able to agree. First, Taxpayer's Workpaper listed five payments in this category, but it only provided four invoices. Although Taxpayer did not dispute the fifth transaction, the total amount claimed in this category cannot be substantiated and verified without the documentation of the fifth transaction. Additionally, the Department's audit summary listed that Taxpayer purchased this line item on March 13, 2008, but the five payments in Taxpayer's Workpaper fell on multiple different dates. The discrepancies in this category cannot be reconciled based on the documentation provided. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

H. Other 2008 Asset Additions.

Taxpayer's Workpaper designated the Department's audit assessments on "Bar," "Flooring," "Alarm System," "Equipment," and "Leasehold Improvement" as "Other 2008 Asset Additions" in its protest. Taxpayer provided a summary, claiming that it was not responsible for some of the use tax because its contractors/vendors paid the sales tax on the materials used and/or certain payments were made for "Labor," which were not subject to sales/use tax.

Upon reviewing Taxpayer's documentation, the Department is not able to agree. Taxpayer is reminded that it is required to maintain adequate records so the Department can determine the proper amount of Taxpayer's tax liability. IC § 6-8.1-5-4(a). "The records... include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks." *Id.* Taxpayer's summary simply referred to check numbers, dates, memo of the checks, and amounts of the check payments. While the audit assessed Taxpayer use tax on "Bar," "Flooring," "Alarm System," "Equipment," and "Leasehold Improvement," Taxpayer's summary failed to explain and support the payments were for "Bar," "Flooring," "Alarm System," "Equipment," and "Leasehold Improvement." For example, the audit assessed use tax on "Bar" in the amount of "\$10,155." Taxpayer's summary failed to explain which payments were made relating to "Bar" in the amount of "\$10,155." Specifically, Taxpayer provided two (2) invoices to demonstrate the purported costs of modification for "Bar." However, the aggregate amount of these two invoices was \$7,451.81, not the listed "\$10,155." Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden demonstrating that the Department's assessment is not correct.

In short, Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest is sustained, in part, and respectfully denied, in part. Taxpayer's protest of Category B is sustained. The remainder of Taxpayer's protest is respectfully denied. The Department will recalculate Taxpayer's tax liabilities in a supplement audit.

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